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IN THE

Supreme Court of the United States

October Term, 1963

No. 30

EDWARD R. FIELDS and NATIONAL STATES RIGHTS PARTY, and ROBERT LYONS,

Appellants,

—v.—

CITY OF FAIRFIELD, a Municipal Corporation,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Petitioner, NAACP Legal Defense and Educational Fund, Inc., respectfully moves this Court for permission to file the attached brief *amicus curiae* and as reasons therefor sets forth the following:

1. Petitioner is a New York corporation organized for the purpose, among other things, of securing equality before the law, without regard to race, for all citizens. In this connection members of petitioner's staff often have represented Negro citizens before various courts, including this Court, on claims that they have been denied equal protection of the laws, due process of law, and other rights secured by the constitution and laws of the United States. Moreover, members of petitioner's staff have represented citizens who have been denied First Amendment rights while attempting to secure equal treatment within society and before the law without regard to race.

2. It goes without saying that petitioner abhors the anti-Negro, anti-Semitic views and political program of Edward R. Fields and the National States Rights Party. They have opposed petitioner's program vigorously.[1] They embrace a policy of racism diametrically opposed to the fundamental principles upon which our nation was founded. At the same time petitioner is compelled to recognize that if this particular conviction against Fields is upheld, a precedent in the Alabama courts will be affirmed, and substance will be given to similar proceedings in other courts directed against proponents of equality, which will deny rights secured by the Fourteenth Amendment and seriously impede the movement for equal rights now current in the nation. While petitioner believes that all lawful measures should be taken against illegal conduct by Fields and his party, it does not believe that the state may proceed against him in a way which denies First Amendment rights. Difficult as it may be to take this position in this case,[2] petitioner believes that First Amendment rights must be vigorously guarded if the proponents of equality are to triumph. Injunctions cannot restrain political expression, and contempt penalties for the violation of such injunctions must not be sustained or the right to petition for equal protection of the laws will be violated.

3. Advocates of racial equality have been the victims of innumerable legal proceedings of various sorts throughout the South. See, *e.g. Garner* v. *Louisiana*,[3] *Peterson* v.

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[1] See New York Times, September 24, 1963, p. 1, col. 1.

[2] But see Gellhorn, *American Rights* 50 (1960): "[C]onstitutional issues have to be fought out on their own merits, rather than on the merits of the individual in connection with whom the issue may have arisen."

[3] 368 U. S. 157.

City of Greenville,[4] *Edwards* v. *South Carolina*,[5] *Taylor* v. *Louisiana*,[6] *NAACP* v. *Alabama*.[7] All of these efforts to use the criminal law, the common law and various other powers of government to stifle free expression on behalf of racial equality have failed. Now it is claimed that by the device of imposing an injunction, First Amendment expression on behalf of racial equality can be stifled, at least until ultimate adjudication of the underlying issues in the case, which may be a matter of years. See *NAACP* v. *Alabama*.[8] Pursuant to this new tactic various governmental bodies have obtained injunctions against demonstrations on behalf of racial equality throughout the South.[9]

Indeed, within the State of Alabama, a conviction for contempt for having violated a temporary restraining order obtained without notice recently was entered against Wyatt T. Walker, Dr. Martin Luther King and others in the City

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[4] 373 U. S. 244.

[5] 372 U. S. 229.

[6] 370 U. S. 154.

[7] 360 U. S. 240.

[8] 360 U. S. 240.

[9] *Alabama* v. *Robinson*, Circuit Court of Etowah County, Alabama, amended temporary injunction issued June 18, 1963; *Alabama ex rel. Flowers* v. *Zellner*, Circuit Court of DeKalb County, Alabama, May 7, 1963; *C.O.R.E.* v. *Douglas*, 318 F. 2d 95, injunction vacated 5th Circuit, May 13, 1963; *Kelley* v. *Page*, M. D. Ga., July 19, 1963, injunction vacated, 5th Cir., July 24, 1963; *City of Jackson* v. *Salter*, Chancery Court of the First Judicial District of Hinds County, Mississippi, No. 63,429, June 6, 1963; *Porzio* v. *Williams*, Superior Court of Chatham County, Georgia, June 19, 1963; *City of Clarksdale* v. *Aaron Henry et al.*, Coahoma County Court, Mississippi, July, 1963; *City Council of Charleston* v. *NAACP et al.*, Court of Common Pleas, Charleston, South Carolina, temporary restraining order entered July 26, 1963; *Messelman Theatres* v. *McLean et al.*, Superior Court of Cumberland County, North Carolina, temporary restraining order entered May 29, 1963; *Knight* v. *NAACP et al.*, County Court, Pine Bluff, Arkansas, No. 34,703, temporary restraining order entered August 13, 1963.

of Birmingham, on the authority of *Fields* v. *City of Fairfield*, 273 Ala. 588, 143 So. 2d 177.[19]

4. Because of this dimension of the case, which may not adequately appear in argument on behalf of Dr. Fields and his party, and because of the involvement of the NAACP Legal Defense and Educational Fund in behalf of the defendants in most of the cases cited above, we respectfully submit that the views of the Fund on this issue may be of interest to the Court.

5. Petitioner has requested permission of appellants and appellee to file this brief *amicus curiae;* these requests have been denied.

WHEREFORE petitioner prays that the attached brief *amicus curiae* be permitted to be filed with this court.

Respectfully submitted,

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[19] *City of Birmingham* v. *Walker et al.*, Circuit Court, Tenth Judicial Circuit, Alabama, contempt conviction decreed April 26, 1963; brief for respondent City of Birmingham, Supreme Court of Alabama, pp. 21-24.

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BRIEF *AMICUS CURIAE*

The interest of this *amicus* is set forth in the above motion for leave to file brief *amicus curiae.*

Amicus adopts the statement of facts as set forth in appellants' brief.

1. Upholding appellants' conviction, the Alabama Supreme Court ruled in effect that punishment may be imposed for violation of a judicial order restraining the distribution of pamphlets and the holding of a political meeting. But punishment cannot be inflicted for the peaceful exercise of First Amendment rights. *Edwards* v. *South Carolina*, 372 U. S. 229; *Talley* v. *California*, 362 U. S. 60; *Terminiello* v. *Chicago*, 337 U. S. 1. It may, of course, be imposed for certain activities excluded from First Amendment protection although they are closely connected with speech. But a state is not free to adopt procedures "without regard to the possible consequences for constitutionally protected speech," *Marcus* v. *Property Search Warrant*, 367 U. S. 717, 731, and for that reason the power to impose

a prior restraint upon expression has unquestionably been denied. *Near* v. *Minnesota*, 283 U. S. 697; *cf. Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296, 304-307; *Niemotko* v. *Maryland*, 340 U. S. 268; *Staub* v. *Baxley*, 355 U. S. 313. Indeed, the reason that vague statutes are unconstitutional when applied to First Amendment rights is that their very existence has an inhibitory effect upon expression and, therefore, in that sense they constitute a prior restraint. See *NAACP* v. *Button*, 371 U. S. 415; *cf. Bantam Books* v. *Sullivan*, 372 U. S. 58. Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67.

The question on this appeal is whether a state may impose a criminal penalty for the exercise of free speech by adopting a rule of procedure prohibiting collateral attacks on injunctions restraining First Amendment rights. If, as the court below ruled, Fields was required to obey the injunction of the Fairfield Circuit Court until its validity had been adjudicated or incur certain punishment, then by utilizing the proscribed device of enjoining expression, a state may achieve a result otherwise prohibited—criminal punishment of peaceful expression.

We believe that this Court has made clear its disapproval of rules so destructive of constitutional rights. Manifestly no court has the power to achieve by injunction a result which government may not constitutionally effect. Compare *Shelley* v. *Kraemer*, 334 U. S. 1, with *Buchanan* v. *Warley*, 245 U. S. 60; and compare *NAACP* v. *Alabama*, 357 U. S. 449 with *Bates* v. *City of Little Rock*, 361 U. S. 516. "It is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." *NAACP* v. *Alabama*, *supra*, at p. 462.

In *Thomas* v. *Collins*, 323 U. S. 516, the Court stated at p. 540:

> If the exercise of the rights of free speech cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition of exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.

2. As authority for its position that the question of constitutionality of a judicial order may not be adjudicated on an appeal from a judgment of conviction for contempt, the court below relied on *United States* v. *United Mine Workers of America*, 330 U. S. 258. In that case a majority of the Court held that the injunction was lawful because they found that the Norris-LaGuardia Act did not apply. (In this case, *amicus* contends that the injunction is unlawful.) The opinion of the Court and that of Mr. Justice Frankfurter concurring in the judgment also stated that the validity of a criminal conviction for contempt would not be reversed on the ground that the underlying order was invalid.

However, in *Mine Workers* the effect on constitutional rights of denying collateral attack was not in issue. Where constitutional rights *are* affected, the Supreme Court of the United States has consistently reversed criminal contempt convictions for disobedience of judicial orders. *Johnson* v. *Virginia*, 373 U. S. 61; *George* v. *Clemmons*, 373 U. S. 241; *Thomas* v. *Collins*, *supra*.

In *Johnson* v. *Virginia*, and *George* v. *Clemmons*, the orders underlying the contempt convictions were held to violate the equal protection clause of the Fourteenth Amendment. In *George* v. *Clemmons*, 373 U. S. 241, the State argued unsuccessfully that even if the state court's order of segregated seating in the courtroom was illegal, Negroes had no right to violate the order, but instead were required to obey it pending a challenge of its legality in other proceedings. U. S. Law Week, April 30, 1963, p. 3355. In *United Gas, Coke and Chemical Workers of America* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, the injunction which the union disobeyed violated constitutional prohibition against state interference in a field pre-empted by federal legislation. Cf. *In Re Green*, 369 U. S. 689.

Moreover, the opinion of the court in *Mine Workers* noted that "a different result would follow were the question of jurisdiction frivolous and not substantial." 330 U. S. at p. 293. That exception was described by Mr. Justice Frankfurter as follows:

> [A]n obvious limitation upon a court cannot be circumvented by a frivolous inquiry into the existence of a power that has unquestionably been withheld. . . . In such a case, a judge would not be acting as a court. He would be a pretender to, not a wielder of, judicial power. 330 U. S. at p. 310.

As Fields had a clear First Amendment right here, the court's inquiry into its power to issue a temporary restraining order was frivolous.[1] And we do not believe that the

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[1] As the inquiry into the court's power was *ex parte*, Fields had no opportunity to contest the jurisdiction of the court prior to his trial for contempt. If collateral attack on the order is not permitted at the trial for contempt, the conviction may violate due process requirements. *In Re Green*, *supra*, where the Supreme Court reversed a conviction for contempt of an *ex parte* temporary restraining order as a denial of due process.

difficulty inherent in determining the issue of the validity of the injunction is relevant to the existence of a duty to obey pending that determination, as was suggested in *Mine Workers.* (In *Thomas* v. *Collins, supra* and *United Gas, Coke and Chemical Workers* v. *Wisconsin Employment Relations Board, supra,* the issues were extremely complicated.) Rather, the sole question is whether the order is required to be reversed because of constitutional infirmity.

Constitutional rights are "present rights. . . . The basic guarantees of our constitution are warrants for the here and now, and unless there is an overwhelmingly compelling reason they are to be promptly fulfilled." *Watson* v. *City of Memphis,* 373 U. S. 526 at p. 533. There is no overwhelmingly compelling reason which warrants delay of the exercise of the First Amendment rights pending judicial consideration and reversal of an unconstitutional order. The reason suggested in *Mine Workers,* respect for judicial process, has "a seductive attractiveness," Murphy, *J.* dissenting in *U. S.* v. *United Mine Workers of America, supra,* at p. 340, but is not compelling in the sensitive area of First and Fourteenth Amendment rights on close examination.

If the injunction were valid and the judgment of contempt were properly imposed the judiciary would be vindicated and appellant would be required to serve his sentence. But, it is argued that even an invalid temporary restraining order must be obeyed to vindicate respect for the judiciary. If the prior restraint is, as we submit, unconstitutional, then the courts are not denied respect by reversing a contempt conviction any more than when any other conviction is reversed, as for a faulty indictment or charge to the jury or as when a statute or proceeding under the common law is held to violate similar rights. The fact is that the ulti-

mate and underlying respect for the law demands, under our system, that all men, including those sitting as judges, act within the limitations of the Constitution of the United States.

Prior to *Mine Workers* this Court apparently believed that respect for the courts would be maintained if it followed the rule that when a court acted without power its orders were regarded as a nullity and no penalty could be imposed for disregard of them. In *Ex Parte Sawyer*, 124 U. S. 200, a contempt conviction for disobeying a restraining order granted in direct contravention of a federal statute prohibiting injunctions of state court proceedings was reversed. The Court held that the statute's restriction nullified the injunction.

In *Ex Parte Fisk*, 113 U. S. 713, a contempt conviction was reversed because the order which was disobeyed was in a category which the court could not issue. No penalty for disobedience was imposed in *Ex Parte Rowland*, 104 U. S. 604, because the writ of mandamus exceeded the legal limitation permissible for such orders.

It was only where the court had the power to make the order that a contempt conviction was upheld. In *United States* v. *Shipp*, 203 U. S. 563, the case which was relied upon in the *Mine Workers* opinions,[2] the Court had the power to issue the stay order which was violated. It so stated at p. 573. There was no doubt then that the Supreme Court has the power to issue a stay pending its determination of the merits of an appeal. There is no doubt today. "How could there be doubt about a power that has existed uninterruptedly ever since Congress gave it by the Act of September 24, 1789? Section 14 of the Judiciary Act, 1 Stat. 73, 81-82." Frankfurter, *J.*, dissenting in *Rosenberg* v. *United States*, 346 U. S. 273, 302 fn. 1.

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[2] *Worden* v. *Searls*, 121 U. S. 14, also cited in *Mine Workers*, was not a criminal contempt case.

In *Shipp*, Mr. Justice Holmes held that the question of whether or not there was a Federal question raised on an appeal from a denial of habeas corpus was irrelevant to the question of the Court's authority to stay execution pending its decision to hear the appeal. The Court's authority to issue stays pending appeal might indeed have been used erroneously where the appeal was without merit. However, a decision dismissing the appeal would cast no doubt upon the authority of the Court to issue the stay or vitiate the authority of the Court to issue stay orders in the future.

Unlike *Shipp*, in this appeal the constitutional question is directed to the authority of the Court to issue the injunction underlying the contempt conviction. If, as we contend, the Fourteenth Amendment to the United States Constitution prohibited the issuance of the injunction, the injunction was a nullity and of no effect and the State may not impose punishment for its violation.

Those pressing for Fourteenth Amendment rights may well risk punishment if they mistake the area of constitutional protection; they should not incur punishment when their rights are vindicated.

If the decision of the lower courts in this case is not reversed, we will see the serious consequences of which Mr. Justice Rutledge warned in his dissent in *Mine Workers*:

> Thus, the constitutional rights of free speech and free assembly could be brought to naught and censorship established widely over those areas merely by applying such a rule to every case presenting a substantial question concerning the exercise of those rights. This Court has refused to countenance a view so destructive of the most fundamental liberties. Thomas v. Collins, 323 U. S. 516, 89 L. ed. 430, 65 S. Ct. 315.

> These and other constitutional rights would be nullified by the force of invalid orders issued in flat violation of the constitutional provisions securing them, and void for that reason. 330 U. S. at p. 352.

CONCLUSION

If all that were involved here were the merits of Fields's obnoxious notions, the result would be simple. But principles of constitutional law which bear upon his contempt conviction transcend the particulars of his case. As shown in the above Motion for leave to file this brief *amicus curiae*, far more common than an injunctive suit against a Fields are the proceedings being conducted throughout the South against proponents of equality. See cases cited *supra*, p. 3. The freedom of speech which petitioners invoke in those cases is the same which is at issue here. When Fields breaks the law he should be prosecuted promptly and vigorously. But the great protections of the Constitution which redound to all should not be scrapped in the course of keeping his conduct within lawful bounds.

Respectfully submitted,

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